Article

Examining the Requirement of Habitability under the South African Landlord-Tenant Framework

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Abstract

There are three rental housing sectors in South Africa, namely the private, the public, and the social sector. The private sector comprises the landlord–tenant relationship between purely private parties. The public sector comprises a rental relationship between low-income tenants and the state as public landlord, and the social sector comprises a rental relationship between lower-income tenants and state-subsidised landlords. Private residential housing is regulated by the Rental Housing Act 50 of 1999 (RHA) and the common law. In terms of the common law, a landlord is obliged to place and maintain the property in a condition that is reasonably fit for the purpose for which it was rented. The RHA is pending an amendment, which will expressly alter the common law and include the requirement of habitability in the landlord-tenant framework. In terms of the Rental Housing Amendment Act 35 of 2014 (RHAA), private-sector landlords will be required to provide tenants with a habitable dwelling and maintain the existing structure of such a dwelling in a habitable condition for the duration of the lease. "Habitability" in the RHAA refers to a dwelling that is safe and suitable to live in and has adequate space, protection from the elements and other threats to health, ensures the physical safety of the tenant, the tenant's household and visitors, and is structurally sound. The RHAA defines "maintenance" as including such repairs and upkeep as may be required to ensure that a dwelling is in a habitable condition. Conversely, public residential housing does not fall under the ambit of the RHA, but it is regulated under a different framework, the National Housing Code of 2009 (NHC), while social rental housing is regulated under the Social Housing Act 16 of 2008 (SHA). The research problem is that the NHC and SHA are not currently housed under the ambit of the RHA. Accordingly, this article aims to investigate where the NHC and SHA fit into the South African landlord-tenant framework, as regards the requirement of habitability. It is important to explore the concept of

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habitability so as to paint a coherent, complete picture and delineate the scope of what constitutes habitability in respect of tenants' rights in all three rental sectors.

Keywords: Constitutional obligations; habitability; landlord-tenant; National Housing Code; Rental Housing Act; Social Housing Act

Introduction

There are three rental housing sectors in South Africa, namely the private, the public, and the social sector (Viljoen 2016, 67). The private sector comprises a landlord-tenant relationship between purely private parties; the public sector comprises a rental relationship between low-income tenants and the state as a public landlord; and the social sector comprises a rental relationship between lower-income tenants and state-subsidised landlords (Viljoen 2016, 67).

Private residential housing is regulated by the Rental Housing Act 50 of 1999 (RHA) and the common law (Bradfield and Lehmann 2013, 137; Glover 2014, 500; Viljoen 2016, 67; Mohamed 2019, 16; Muller et al. 2019, 500; Wilson 2021, 82–88). The RHA aims to inform landlords and tenants of their respective rights and obligations arising from a lease agreement and protect these parties from exploiting each other (Preamble of the RHA; Mohamed 2019, 16–17; Wilson 2021, 88). In terms of the common law, a landlord is obliged to place and maintain the property in a condition that is reasonably fit for the purpose for which it was rented.[1] The RHA is pending an amendment, which will expressly alter the common law and include the requirement of habitability in the landlord-tenant framework. In terms of the Rental Housing Amendment Act 35 of 2014 (RHAA), private sector landlords will be required to provide tenants with a habitable dwelling and to maintain the existing structure of such a dwelling in a habitable condition for the duration of the lease.[2] "Habitability" in the RHAA refers to a dwelling that is safe and suitable to live in, which has adequate space, protection from the elements and other threats to health and ensures the physical safety of the tenant, the tenant's household and visitors, and is structurally sound.[3] The RHAA refers to

1 *Mpange v Sithole* 2007 (6) SA 578 (W) para 28 (*Mpange*). See further, *Frenkel & Co v Rand Mines Produce Supply Co* 1909 TS 129 131; *Poynton v Cran* 1910 AD 205 214; *Sarkin v Koren* (2) 1949 (3) SA 545 (C) 551–552; *Hunter v Cumnor Investments* 1952 (1) SA 735 (C) 740; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A) 150; *Fourie NO en 'n Ander v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A) 931; *Proud Investments (Pty) Ltd v Lanchem Inter (Pty) Ltd* 1991 (3) SA 738 (A) 748; *Pete's Warehousing & Sales CC v Bowsink Investments CC* 2000 (3) SA 833 (E) 839; *Gateway Properties (Pty) Ltd v Bright Idea Projects* 249 CC 2014 (3) All SA 577 (KZP) paras 22 and 24.

2 Section 4B (11) of the RHAA.

3 Section 1 of the RHAA.

"maintenance" of a dwelling, including repairs and upkeep as may be required to ensure that a dwelling is in a habitable condition.[4]

Conversely, public residential housing does not fall under the ambit of the RHA, but it is regulated under a different framework, the National Housing Code of 2009 (NHC). The NHC sets out the underlying housing policy principles, guidelines, norms, and standards that apply to the government's various housing assistance programmes (Department of Human Settlements 2009a, 9). Also, social rental housing is regulated under the Social Housing Act 16 of 2008 (SHA) (Viljoen 2016, 72–73), which aims to regulate all social housing institutions. A "social housing institution" is an institution accredited or provisionally accredited under the SHA to provide affordable rental or co-operative housing options for low- to medium-income households (Section 1 of the SHA). The research problem identified is that the NHC and SHA are not currently housed under the ambit of the RHA. Accordingly, the purpose of this article is to investigate where the NHC and SHA fit into the South African landlord-tenant framework as regards the requirement of habitability. It is important to explore the concept of habitability so as to paint a coherent, complete picture and delineate the scope of what constitutes habitability in respect of tenants' rights in all three rental sectors.

The article is divided into nine parts. Part one introduces the topic. Part two offers a constitutional analysis of the requirement of habitability. This is followed by an analysis of the requirement of habitability in the landlord-tenant framework, in part three. Part four investigates where the NHC and SHA fit into an analysis of habitability in the landlord-tenant framework. Thereafter, part five considers the potential impact the National Building Regulations and Building Standards Act 103 of 1977 (NBRBSA) has on landlords. Part six questions whether it is economically viable to require public and social sector landlords to ensure habitability, and examines if such a requirement might not result in the NHC and SHA becoming redundant. In part seven, the question of how the requirement of habitability can be implemented, given the current shortage of rental housing, is explored. How the concept of habitability is defined in the landlord-tenant framework is dealt with in part eight, before part nine concludes the article.

The Requirement of Habitability: A Constitutional Dimension

The Requirement of Habitability in Light of International Law

In terms of section 26(1) of the Constitution of the Republic of South Africa, 1996 (Constitution), "[e]veryone has the right to have access to *adequate* housing." This section does not, however, define what "adequate" means. In *Government of the Republic of South Africa v Grootboom* (2001 (1) SA 46 (CC) para 37 (*Grootboom*), the Constitutional Court pointed out that what constitutes *adequate* housing depends on the particular context. In terms of section 39(1)(b) of the Constitution, when determining the meaning of the rights in the Bill of Rights, consideration must be given to

4 ibid.

international law. Furthermore, preference must be given to any reasonable interpretation of legislation that is consistent with international law (section 233 of the Constitution).

On 12 January 2015, South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11(1) of the ICESCR provides that everyone has the right "to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." General Comment 4 on article 11(1) of the ICESCR provides the content of the right to adequate housing, noting that seven factors must be considered when determining the meaning of *adequate* housing under the ICESCR (CESCR's General Comment No 4 (sixth session, 1991) *The Right to Adequate Housing* (article 11(1) of the ICESCR), UN Doc E/1992/23 para 8(a)–(g)). One of those factors is relevant for this article, namely habitability. According to General Comment 4, an *adequate* house is habitable if it provides an inhabitant with "adequate space and protects them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of the occupants [is] guaranteed as well" (CESCR's General Comment No 4 (sixth session, 1991) *The Right to Adequate Housing* (article 11(1) of the ICESCR), UN Doc E/1992/23 para 8(d)).

It then becomes important to consider whether these elements can aid in arriving at an understanding of habitability, especially in so far as it potentially points to an overall meaning thereof. What does habitability, therefore, mean? And are there elements that can be crystalised to provide some understanding of what can be expected of a habitable house? Adequate space essentially has to do with a house that is suitable to the extent that it has sufficient room (or the area must be equipped) to do the basic things a person needs to do in the house where he or she lives (Sphere Association 2018, 254–255). This would mean that a space becomes *adequate* if it provides its inhabitants with a sufficient area to perform daily household activities such as cooking, eating, sleeping, bathing, washing, dressing, and storing food or water safely and securely (Rapelang 2013, 97; Sphere Association 2018, 254–255).

To be protected against "the elements," the inhabitant of a house must be protected from cold, damp, heat, rain, or wind (CESCR's General Comment No 4 (sixth session, 1991) *The Right to Adequate Housing* (article 11(1) of the ICESCR), UN Doc E/1992/23 para 8(d)). Protection against the elements has to do with the physical structure of the house, which should be able to withstand adverse weather conditions. An inhabitant must also enjoy protection from other threats to health, which means that an inhabitant must not occupy a house that poses a serious danger to his or her health, or presents the risk of harm. For example, the ceiling of a house should be repaired or replaced if it is dilapidated or the roof has asbestos that might pose a danger to the inhabitants' health (Muller and Viljoen 2021, 334–335). The requirement of physical safety in General Comment 4 refers to third parties. In other words, inhabitants are entitled to protection from intruders (e.g., a robber). In this regard, it may be appropriate, for instance, to

install an alarm system and/or burglar bars, and erect a fence or wall (Stoop 2014, 811; Muller and Viljoen 2021, 334).

The Constitutional Obligation to Ensure Habitability

In terms of section 7(2) of the Constitution, the state has an obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights. The state can achieve this constitutional obligation by taking positive measures to ensure that inhabitants (including tenants) live in habitable conditions. [5] When the state takes such positive measures, it also fulfils its constitutional objectives to promote a safe and healthy environment.[6]

The state should not be the only entity that is responsible for ensuring that inhabitants reside in housing that is in a habitable state.[7] Landlords should be compelled by legislative and other measures to provide tenants with habitable rental housing.[8] In terms of section 8(2) of the Constitution, landlords should be held liable to ensure the habitability of rental housing, noting that "[a] provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." There are, of course, numerous cases that deal with the question of positive obligations on private individuals, although not directly in the context of ownership of land. These cases nonetheless raise important questions about what can be expected of private parties in terms of section 8(2) of the Constitution.[9] This is because landlords owe constitutional obligations to those who rent their premises.[10]

Liebenberg and Kolabhai (2022, 264–266) welcome the recognition of the application of positive human rights duties to non-state entities (such as landlords), as illustrated in *Daniels*. They assert that "[t]he denial that private parties bear positive duties under our transformative [C]onstitution is a manifestation of the pervasive tendency of classic liberal and neoliberal legal culture to shield private power from responsibility for contributing to the public good." Similarly, Madlanga (2018, 364) argues:

> If we are to take seriously the transformative injunction of our Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person', then our private

5 Section 26(2) of the Constitution; *Grootboom* para 24.
6 Section 152(1)(d) of the Constitution.
7 *Grootboom* (n 5) para 35.
8 Section 26(2) of the Constitution; *Grootboom* (n 5) para 24.
9 For the application thereof on private parties, see generally *Governing Body of the Juma Musjid Primary School v Essay NO* (CCT 29/10) [2011] ZACC 13 (11 April 2011) para 58; *Daniels v Scribante* 2017 (4) SA 341 (CC) paras 38–39 (*Daniels*); *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC) paras 86–91 (*per* Nicholls AJ), 120–131 (*per* Theron J), 215–216 and 227 (*per* Cameron J and Froneman J) and 224 (*per* Khampepe J). See further, Madlanga 2018, 364–368; Lowenthal 2020, 261–274; Liebenberg and Kolabhai 2022, 264–266.
10 *Grootboom* (n 5) paras 34–35.

> interactions cannot be left out of the reach of those human rights obligations that may appropriately be borne by private individuals. We cannot take a 'business as usual' approach and maintain the status quo insofar as our private interactions are concerned.

Madlanga (2018, 368) goes on to state:

> Simply put: if we refuse to impose human rights obligations on private individuals for fear of interfering with their autonomy, we risk maintaining a perverse *status quo* which entrenches a social and economic system that privileges the haves, mainly white people in the South African context. By imposing certain human rights obligations on private individuals and companies, we acknowledge that our current social and economic realities have arisen out of our perverted past and cannot be sanitised.

The arguments by Liebenberg and Kolabhai as well as Madlanga signal that the Constitution does not allow a reliance on common law to the detriment of constitutional rights and the broader interests of the public.

Hershkoff (2008, 299) also argues that

> [i]n the classical conception, common law powers can be used in the holder's discretion to maximize self-utility; the egoistic exercise of power is assumed to conduce to the general welfare. The presence of social welfare norms in a [C]onstitution alters this background assumption. From a constitutive theory of law, the powers assigned to individuals must now be interpreted and applied within the orbit of constitutional commitment and not simply within that of self-regarding concern. (See also Pieterse 2007, 162–163; Liebenberg 2008, 467–469)

Hershkoff (2008, 299) asserts that "the constitutional norm exercises a radiating effect on a legal relation and in some settings, the court must recalibrate the balance of interests guiding the private entity's exercise of power." The positive obligation that could be imposed on landlords may differ from the positive obligation imposed on the state. While private, public, and social sector landlords are required to physically provide habitable rental housing, it is unlikely that the same obligation can be imposed on the state on private land. The state cannot be expected to build or upgrade rental housing to a habitable state on private land. However, the state may be expected to take positive steps to protect and promote the right to habitable rental housing of private, public and social sector tenants.

The Landlord-Tenant Framework: The Rental Housing Act

Private residential housing is regulated by the RHA and the common law (e.g., private sector leases) (Bradfield and Lehmann 2013, 137; Glover 2014, 500; Viljoen 2016, 67; Mohamed 2019, 16). The RHA was promulgated with the express intention of defining the responsibility of the state in respect of rental housing property. It creates mechanisms to promote the provision of such property as well as access to adequate housing, in order to ensure the proper functioning of the rental housing market. The RHA makes provision for the establishment of Rental Housing Tribunals, and defines

the functions, powers and duties of such tribunals. The RHA lays down the general principles governing conflict resolution in the rental housing sector. It provides for the facilitation of sound relations between tenants and landlords and, for this purpose, lays down general requirements relating to leases. Finally, the RHA repealed the Rent Control Act of 1976.[11] It is clear from the Preamble that the RHA was enacted to give effect to section 26 of the Constitution, because rental housing is a key component of the housing sector. The RHA essentially aims to inform landlords and tenants of their rights and obligations in relation to the lease agreement, to protect both parties against unfair practices and exploitation (Preamble of the RHA; Mohamed 2019, 16; Wilson 2021, 88). Where there are tensions or conflicts in the exercise of rights, the rights of tenants and landlords must be balanced.[12]

One of the obligations of private sector landlords, arising from a lease agreement, is the obligation to ensure habitability for tenants of rental housing. This obligation can be derived from the common law obligation of being fit for the purpose for which the property was rented (Mohamed 2019, 42). In this regard, the common law imposes the obligation on a landlord to place and maintain the property in a condition that is reasonably fit for the purpose.[13]

In terms of the RHA and its regulation, a landlord is also required to place and maintain the property to be let in a liveable condition, in order to be fit for human habitation.[14] This expressly confirms the common law fit-for-purpose obligation. However, the RHA does not specifically and expressly incorporate the common-law obligation of habitability.

The common-law obligation of the landlord—as outlined above—will (more deliberately and expressly) be enshrined in section 4B(11) of the RHAA, once this Amendment Act comes into effect (Glover 2014, 385; Viljoen 2016, 200; Mohamed 2019, 84). This section of the RHAA will make it compulsory for a landlord to provide tenants with a dwelling that is in a habitable condition—a statutory warranty of habitability (Glover 2014, 385; Viljoen 2016, 200; Mohamed 2019, 45). "Habitability" in the RHAA refers to:

11 Preamble of the RHA.

12 ibid.

13 *Mpange* para 28. See further, *Frenkel & Co v Rand Mines Produce Supply Co* 1909 TS 129 131; *Poynton v Cran* 1910 AD 205 214; *Sarkin v Koren* (2) 1949 (3) SA 545 (C) 551–552; *Hunter v Cumnor Investments* 1952 (1) SA 735 (C) 740; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A) 150; *Fourie NO en 'n Ander v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A) 931; *Proud Investments (Pty) Ltd v Lanchem Inter (Pty) Ltd* 1991 (3) SA 738 (A) 748; *Pete's Warehousing & Sales CC v Bowsink Investments CC* 2000 (3) SA 833 (E) 839; *Gateway Properties (Pty) Ltd v Bright Idea Projects* 249 CC 2014 (3) All SA 577 (KZP) paras 22 and 24.

14 Section 13(4) of the RHA, read together with regulation 6(1)(b)(i) of the Unfair Practice Regulations to the Rental Housing Act 50 of 1999, GN 340 in *GG* 30863 of 14-03-2008 issued by the Department of Housing.

> a dwelling that is safe and suitable for living in and includes adequate space, protection from elements and other threats to health, physical safety of the tenant, the tenant's household and visitors, and a structurally sound building.[15]

The RHAA will require that the landlord also maintain the existing structure of the dwelling in a habitable condition throughout the lease (section 4B(11) of the RHAA). The RHAA added a new meaning of "maintain," which signals that the landlord is required to make repairs and keep the dwelling in a good condition for the tenant to use it in a habitable condition (section 1 of the RHAA; see further, Glover 2014, 385–387; Viljoen 2016, 200–201; Mohamed 2019, 84). The statutory obligation on the part of the landlord to place and maintain the existing structure of the dwelling in a habitable state (once the RHAA comes into effect) will prevent the possibility of tenants accepting a dwelling that is not habitable. This is because the RHAA will not allow tenants to take occupation of uninhabitable dwellings. Furthermore, tenants will no longer be able to take over the landlord's common-law obligation to maintain the dwelling by signing a lease that relieves the landlord (wholly or in part) of his or her obligation (Glover 2014, 385–387; Viljoen 2016, 201; Mohamed 2019, 85).

When it comes to the obligations of the state, especially with respect to privately owned land, it is important to distinguish between the state's obligations to respect, protect, and promote the rights in the Bill of Rights, and the state's obligations to fulfil the rights in the Bill of Rights. The obligation to respect means that the state must desist from preventing or impairing the right of lessees to a habitable dwelling.[16] The obligation to protect means that the state must formulate relevant policies and frameworks, and facilitate the provision of rental housing that is habitable, in partnership with private sector landlords.[17] The obligation to promote means that the state must introduce incentives, mechanisms, and other measures to improve conditions in the private rental housing market.[18]

In *Glenister v President of the Republic of South Africa* (2011 (3) SA 347 (CC) (*Glenister*), the court emphasised that section 7(2) of the Constitution imposes special obligations on the state. For that reason, the court concluded that the requirement that the state "must respect, protect, promote and fulfil the rights in the Bill of Rights" entails that the state must create efficient mechanisms through which infringement of the Bill of Rights is curbed.[19] This is also provided for by the Preamble of the RHA.

While the state is under an obligation to respect, protect, and promote the right of lessees to habitable rental housing, it is unlikely that the state is under an obligation to fulfil

15 Section 1 of the RHAA.

16 *Mpange* paras 50–51, citing *Grootboom* (n 5) para 34; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) paras 31–34.

17 Section 2 of the RHA.

18 Section 2(1)(a)(i) of the RHA.

19 *Glenister* para 177. See also *My Vote Counts NPC v President of the Republic of South Africa* 2017 (6) SA 501 (WCC) para 35.

such a right on privately owned land, as such an obligation would require something more of the state. This is because the state would have to build or improve a tenant's dwelling to make it habitable. In *Glenister* (para 189), the court held that implicit in section 7(2) is the requirement that the steps the state should take to respect, protect, promote, and fulfil constitutional rights must be reasonable and effective. Therefore, requiring the state to build or improve a tenant's dwelling on privately owned land would be unreasonable. Now that this part has set out the landlord-tenant framework, it is important to consider where the NHC and SHA resort under an analysis of habitability in this framework.

Where Does the National Housing Code and Social Housing Act Fit Under an Analysis of Habitability in the Landlord-Tenant Framework?

National Housing Code

Public residential housing is regulated under a different framework, the NHC (e.g., public sector leases). The NHC was enacted to give effect to section 26 of the Constitution (Department of Human Settlements 2009a, 9). In fulfilling the obligations imposed by section 26, the state has, in terms of the Housing Act 107 of 1997 and the NHC, introduced several programmes that provide poor households access to adequate housing (Department of Human Settlements 2009a, 9). One example is the Community Residential Units (CRU) programme, which aims to facilitate the provision of secure, stable rental tenure for lower-income tenants (Department of Human Settlements 2009b, 9). The programme provides a coherent framework for dealing with the many different forms of existing public sector residential housing (Department of Human Settlements 2009b, 9). The manner in which public hostels were previously allocated was on a "per-bed" approach, which was not always favourable to couples (Department of Human Settlements 2009b, 9). Public hostels mostly accommodate single-sex occupants, are overcrowded, and have been neglected (Department of Human Settlements 2009b, 9). They are also not often integrated into the communities where they are located (Department of Human Settlements 2009b, 9). Public hostels have been badly managed and not properly maintained, which has resulted in them being in a serious state of disrepair, resulting in non-compliance with health and safety standards (Department of Human Settlements 2009b, 9).

The CRU programme targets low-income tenants and households earning below R3 500 per month, who cannot be accommodated in the formal private rental market and social housing market (Department of Human Settlements 2009b, 9). The programme seeks to bridge the divide between social housing and lower markets—a divide which poses a significant problem, in that the majority of households access informal rental housing opportunities, as they are not being served or cannot access the formal private rental market or the social housing market (Department of Human Settlements 2009b, 9). It was therefore necessary to introduce the CRU programme to provide a low-income rental housing solution to complement the formal private housing and social housing

markets, and promote access to the formal rental housing market through state subsidy (Department of Human Settlements 2009b, 9–10).

The CRU programme should be seen as forming the basis for transitioning informal and inadequately housed tenants into the formal rental housing market (Department of Human Settlements 2009b, 10). In this regard, public sector landlords must ensure that the signing of leases with public tenants prior to their occupation of the accommodation complies with the RHA (Department of Human Settlements 2009b, 30; see also Viljoen 2016, 75). This statement shows where the NHC fits into the landlord-tenant framework, which is in the provision of rental housing to low-income tenants. That statement also confirms the applicability of the RHA as the "mother" legislation on public residential housing.

As mentioned, the RHAA will require a landlord to provide tenants with a habitable dwelling and to maintain the existing structure of such a dwelling in a habitable condition. Therefore, to comply with the RHA/RHAA, public sector landlords must ensure that the dwellings of their tenants are in a habitable state prior to them occupying the accommodation. As the right to a habitable home falls within section 26(1) of the Constitution, it is one of the rights that public sector landlords (in this case, the state or an organ of state) are obliged by section 7(2) to adhere to, in order to "respect, protect, promote and fulfil the rights in the Bill of Rights." What, then, does the state or organ of state's obligation to respect, protect, promote, and fulfil a public lessee's right of access to adequate rental housing entail, on state-owned land? The state or an organ of state must build or improve a public tenant's dwelling to make it habitable. This approach stems from the need by public sector landlords to respect, protect, promote, and fulfil their obligation in terms of section 26(1) of the Constitution to provide adequately habitable housing to public tenants.[20]

Social Housing Act

Social rental housing is regulated under the SHA (Viljoen 2016, 72–73), which was promulgated with the express intention of establishing and promoting a sustainable social housing environment. It defines the functions of national, provincial, and local governments in respect of social housing. The SHA provides for the establishment of the Social Housing Regulatory Authority in order to regulate all social housing institutions obtaining or having obtained public funds. It allows for the undertaking of approved projects by other delivery agents with the benefit of public money. Finally, the SHA gives statutory recognition to social housing institutions (Preamble of the SHA). This is because there has been a dire need for affordable rental housing for low- to medium-income households that cannot access rental housing in the open market (Preamble of the SHA).

20 *Malan v City of Cape Town* 2014 (6) SA 315 (CC) para 58 (*Malan*).

The preamble of the SHA indicates that the Act was enacted to give effect to section 26 of the Constitution. To ensure the state's compliance with its constitutional obligations under section 26, the Preamble of the SHA provides that

> all three spheres of government must, in terms of section 2(1)(e)(iii) of the Housing Act, 1997, promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions.

In light of the Preamble of the SHA, the national, provincial, and local governments, as the guardians of the well-being of society, have an overarching general function to promote and maintain safe and healthy living conditions in the context of social housing. The fulfilment of this obligation by the government will ensure that slumlording is prevented.

With respect to social housing development, the national, provincial, and local governments, as well as social housing institutions, must afford tenants the necessary human dignity and privacy (section 2(1)(c) of the SHA). Furthermore, these spheres of government must provide social sector tenants with a clean, healthy, and safe environment to ensure that they enjoy continued security of tenure in social housing institutions (section 2(1)(c), read together with section 2(1)(h) of the SHA; see also Viljoen 2016, 73). This confirms the requirement of habitability in the context of social housing, which should be achieved in line with the general provisions governing the relationship between tenants and landlords, as set out in the RHA (section 2(1)(h) of the SHA). This statement indicates where the SHA fits into the landlord-tenant framework, which is in instances where social sector landlords provide rental housing to lower-income tenants. The statement also confirms the applicability of the RHA as the "mother" legislation to social housing institutions. The SHA makes it clear that social housing institutions must function in compliance with the RHA.[21]

As mentioned, the RHAA will require landlords to provide tenants with a habitable dwelling and to maintain the existing structure of such a dwelling in a habitable condition. Here again, social sector landlords must ensure that the dwellings of their tenants are in a habitable condition, as that would be in line with the RHA/RHAA (Social Housing Regulatory Authority and Department of Human Settlements 2019, 4–5). While a social sector landlord is obliged to fulfil social sector tenants' right to a habitable dwelling, it seems unlikely that the state is under the same positive obligation to fulfil the right. To fulfil the right, the state would have to actually build or improve a social sector tenant's dwelling to make it habitable, even if the dwelling is located on privately owned land. It appears that this might be a step too far. However, it is possible

21 Section 14(2)(g) of the SHA.

to argue that the state is under an obligation to take positive steps to respect, protect, and promote social sector tenants' right to a habitable dwelling.[22]

The obligation to respect means that the state should refrain from carrying out practices, policies or legal measures that interfere with social sector tenants' enjoyment of rights (De Vos et al. 2021, 796). In relation to the obligation to protect, the state is required to act positively in regulating, preventing, and remedying breaches of rights (section 4(1)(b) of the SHA; De Vos et al. 2021, 796). This would mean that the state should regulate the actions of social housing institutions and other role-players (Preamble of the SHA; De Vos et al. 2021, 796). Moreover, the obligation to protect means that the state should adopt laws, policies, and regulations to protect social sector tenants' fundamental rights against interference by social housing institutions and other role-players (section 4(1)(b) of the SHA; De Vos et al. 2021, 796). In this regard, the obligation of the state goes beyond its own actions to cover the actions of social housing institutions and other role-players (De Vos et al. 2021, 796). Furthermore, the obligation to protect means that the state must formulate relevant policies and frameworks that facilitate the provision of social rental housing that is habitable by providing subsidies to social sector landlords.[23]

The obligation to promote means that the state should adopt educational and informational programmes that enhance social sector tenants' awareness and understanding of their rights (section 4(1)(b) of the SHA; De Vos et al. 2021, 797). This undertaking by the state will ensure that social sector tenants effectively participate in decision-making processes that affect their rights (De Vos et al. 2021, 797). The obligation to promote means that the state must further introduce incentives, mechanisms, and other measures to improve conditions in the social housing market.[24] Now that this part has set out where the NHC and SHA fit into an analysis of habitability in the landlord-tenant framework, the next part considers the potential impact of the NBRBSA on private, public, and social sector landlords.

The Potential Impact of National Building Regulations and Building Standards Act 103 of 1977 on Landlords

The NBRBSA mainly deals with the design and construction of buildings in the areas of jurisdiction of local authorities (Preamble of the NBRBSA; see also Social Housing Regulatory Authority and Department of Human Settlements 2019, 12). However, the NBRBSA also has a section that prescribes the maintenance and operation after occupation of a dwelling, which places an obligation on the owner to continue

22 Section 3(1)(b) of the SHA.
23 Sections 3(1)(a), (e), (g) and (1), 4(g) and (i)(ii), 5(a)–(c), and 6(1)(a), (c)–(d) of the SHA.
24 Section 3(1)(a) of the SHA; s 5(b) of SHA).

maintaining the dwelling in a safe and habitable state, as it was initially approved for habitation.[25] The section provides that:

> (1) (a) The owner of any building shall ensure that any mechanical equipment, facility or any service installation provided in or in connection with such building, pursuant to these regulations or pursuant to any building by-law which was in operation prior to the coming into operation of the Act, shall be maintained in a safe and functional condition.
>
> (b) Such owner or any person appointed by such owner to be in control of such building shall ensure that where such equipment, facility or installation is designed to be kept operating during the times of normal occupancy of the building, it is kept operating in such a manner as to attain any standard of performance prescribed in these regulations or in any by-law for such equipment or installation.
>
> (2) The owner of any building shall ensure that under these regulations or pursuant to any building by-law that was in operation prior to the coming into operation of the Act, the following is maintained in accordance with the requirements of the relevant functional regulations contained in Regulations B, H, J, K and L:
>
> (i) the structural safety performance (behaviour of buildings under all actions that can be reasonably expected to occur);
>
> (ii) the measures taken to resist the penetration of rain water and the passage of moisture into the interior of a building
>
> (3) The local authority may serve a notice on such owner or person requiring him to comply with subregulation (1) or (2) within the time specified in such notice.
>
> (4) The local authority may, by notice, in writing to the owner, order the evacuation of such building where the state of such building, equipment, installation or facility will cause conditions which in the opinion of the local authority may be detrimental to the safety or health of the occupiers or users of such building.
>
> (5) Any owner or person who contravenes the requirements of subregulation (1) or (2) or fails to comply with any notice served in terms of subregulation (3) or (4) shall be guilty of an offence." (Section A15(1)–(5) of the NBRBSA)

Private, public, and social sector landlords need to note the importance of the above section concerning the maintenance and operation of dwellings for occupation (Social Housing Regulatory Authority and Department of Human Settlements 2019, 12). This section places an obligation on all building owners to maintain their buildings in a safe and habitable condition, subject to normal wear and tear (Social Housing Regulatory Authority and Department of Human Settlements 2019, 12). However, if the building is structurally unsound, unsafe, and uninhabitable for occupants to live in and repairs are

25 Section A15 of the NBRBSA; see also Social Housing Regulatory Authority and Department of Human Settlements 2019, 12.

not effected, the owner of that building will be in breach of the section and the original occupancy certification (Social Housing Regulatory Authority and Department of Human Settlements 2019, 12). Now that the potential impact of the NBRBSA on landlords has been considered, the next part investigates whether it is economically viable to require public and social sector landlords to ensure habitability, and whether such a requirement might render the NHC and SHA redundant.

Is it Economically Viable to Require Public and Social Sector Landlords to Ensure Habitability? Will it not Render the National Housing Code and the Social Housing Act Redundant?

In respect of "economically viable," the question arises whether the requirement of habitability in the public and social sectors would likely be implemented in this context. It would be economically viable to require public and social sector landlords to ensure habitability, because public sector landlords comprise the state or organs of state and thus are funded from public funds, while social sector landlords are state-subsidised (Viljoen 2016, 67). Currie and De Waal (2013, 50) point out that "the state is supposed to be motivated by a concern for the well-being of society as a whole" and in doing something to ensure the well-being of society, it is funded by public funds.[26] "Public funds" in relation to state-subsidised housing means the institutional subsidy, or any other government subsidy utilised for the creation of housing.[27] As such, it may not be difficult for public and social sector landlords to ensure habitability, as they already have some resources at their disposal in terms of public funds or state subsidy.

Viljoen (2016, 75) correctly argues that both public and social sector landlords should aim to accommodate vulnerable and poor tenants in a manner that addresses their vulnerability. As Viljoen (2016, 75) notes, public and social sector landlords should address tenants' socio-economic concerns related to all housing matters, such as maintenance responsibilities. Due to this need, it would therefore be economically viable (and much needed) to require public and social sector landlords to bear the exact same obligation to ensure habitability as private sector landlords under the RHA. Such an approach will ensure that the maintenance concerns of public and social sector tenants are addressed and that their landlords are held accountable in terms of the requirement of habitability.

It would also be economically viable for public and social sector landlords to ensure habitability, because ensuring that a dwelling is habitable has more economic benefits than economic costs: for instance, tenants would continue to rent the property while enjoying secure tenure. Madlanga J[28] makes the point that if "you take away habitability, that may lead to [a tenant's] departure. That in turn may take away the very essence of

26 See also *Daniels* para 40.
27 Section 1 of the SHA.
28 *Daniels* (n 26) para 33.

[a tenant's] way of life. Most aspects of people's lives are often ordered around where they live." Madlanga J[29] adds that if one "[t]ake[s] away the home that is the fulcrum of security of tenure, the way of life of [a tenant] will be dislocated." Therefore, a habitable dwelling is important for every tenant's enjoyment of continued security of tenure.

Apart from enjoying secure tenure, habitability as defined by the RHAA will bring to the fore the following benefits in the public and social sectors: (a) adequate space; (b) protection from the elements and other threats to health; (c) physical safety; and (d) a structurally sound building. Consequently, an economic cost argument by public and social sector landlords would not work in this context because of the unequal bargaining position of landlords and tenants in respect of the lease agreement. The qualification for public or social rental housing has compromised the economic and social status of tenants by limiting their scope to negotiate the terms of the lease agreement in general (*Malan* para 28) and the benefits that come with the habitability of a dwelling in particular.

An economic cost argument by public and social sector landlords may also not work in this context because it results in the obfuscation of the crucial issue, which is whether public and social sector landlords are required to provide tenants with a dwelling that is in a habitable condition. As it was established in the above analysis that public and social sector landlords are required to ensure the habitability of dwellings occupied by their respective tenants, such an obligation must be fulfilled in line with the framework of the RHA. This is because the RHA, as "mother" legislation, arguably seeks to achieve the same standard of habitability for all tenants. (For the standard of habitability in the context of tenants, see generally Ngwenyama 2021, 64–90).

Having established that it is economically viable to require public and social sector landlords to ensure habitability, it becomes important to question whether such an approach might not result in the NHC and SHC becoming redundant. Imposing the obligation to ensure habitability on public sector and social sector landlords will not result in the NHC and SHA being redundant, because the essence of the requirement of habitability in the landlord-tenant framework seeks to break away from the tendency of common law to limit relief that will be advantageous to private sector tenants in general, as well as public and social sector tenants in particular, such as the provision of habitable dwellings and the maintenance of such dwellings in a habitable condition. Now that the law and economics surrounding the requirement of habitability have been analysed, the next part provides an analysis of how habitability could be implemented amidst a shortage of rental housing.

29 ibid para 34.

How Can the Requirement of Habitability be Reconciled/Implemented with the Current Shortage of Rental Housing?

The RHA does not contain a provision that specifically deals with how the requirement of habitability can be reconciled/implemented with the current shortage of rental housing. However, section 3 of the RHA, dealing with measures to increase the provision of rental housing property, speaks to this question. It provides that:

> (1) The Minister may introduce a rental subsidy housing programme, as a national housing programme, as contemplated in section 3 (4) (g) of the Housing Act, 1997 (Act No. 107 of 1997), or other assistance measures, to stimulate the supply of rental housing property for low income persons.
>
> (2) Parliament may annually appropriate to the South African Housing Fund an amount to finance such a programme.
>
> (3) A separate account of income and expenditure in respect of such programme must be kept.
>
> (4) Section 12 (1) (b) of the Housing Act, 1997 (Act No. 107 of 1997), does not apply to any amount appropriated by Parliament for purposes of such programme.

The implementation of the requirement of habitability in the rental sector should form part of the rental subsidy housing programme. The minister may also provide other assistance measures aimed at stimulating the supply of rental housing properties that are in a habitable condition. Parliament may annually appropriate to the South African Housing Fund a portion of money to finance the implementation of the requirement of habitability in the rental housing market. This approach has the potential to curb the shortage of rental housing that is caused by uninhabitable dwellings/buildings in areas such as the inner city, and public hostels and flats, etc. The South African Housing Fund was established in terms of section 12B (1) (a) of the Housing Arrangements Act 155 of 1993, which continues to exist for the purposes of financing housing-related activities.[30] This fund consists, among other things, of contributions from any source for the purposes of housing development.[31] "Housing development" in the HA refers to

> the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to –
> i) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and

30 Section 11(1) of the Housing Act 107 of 1997 (HA).
31 Section 11(2)(c) of the HA.

ii) potable water, adequate sanitary facilities and domestic energy supply.[32]

This definition applies to both private and public sector dwellings (Muller and Viljoen 2021, 318). Arguably, it should also apply to social sector dwellings (Social Housing Regulatory Authority and Department of Human Settlements 2019, 5). The definition relates to the construction and continued maintenance of dwellings (See also Muller and Viljoen 2021, 318). It indicates that tenants' dwellings must be in a location that provides them with access to economic opportunities and social amenities such as schools, clinics, shopping centres, etc. (See also Muller and Viljoen 2021, 318). Furthermore, the definition signals that tenants must, on a progressive basis, have access to permanent residential dwellings with secure tenure, adequate protection against the elements, and certain basic services, such as water, electricity and sewerage and sanitation (See also Muller and Viljoen 2021, 318). This definition essentially speaks to the requirement of habitability and how a shortage of rental housing could be curbed. Now that this part has explored the issues relating to habitability and the shortage of rental housing, the next part looks at whether the concept of habitability is subjectively or objectively defined.

How is the Concept of Habitability Defined in the RHAA? Is it a Subjective or Objective Concept?

In the RHAA, the concept of habitability is defined as an objective concept because it has substantially more tangible, descriptive, and measurable technical features (Social Housing Regulatory Authority and Department of Human Settlements 2019, 5). As such, it will have to be proved based on facts and evidence. This approach indicates the legislature's intention to avoid different interpretations of the concept of habitability that could amount to the concept being subjective and unmeasurable (Social Housing Regulatory Authority and Department of Human Settlements 2019, 5).

Attempts to define the concept of habitability objectively should be welcomed. This is because it is intended to protect vulnerable and poor tenants who lack bargaining power for habitable dwellings. Viljoen correctly points out that the impact and implementation of such a definition of habitability will depend on whether (a) vulnerable and poor tenants are able to enforce it either in a court of law or the Rental Housing Tribunal, and (b) a landlord will be ordered to comply with the definition, particularly when such a landlord is not the owner of the dwelling (Viljoen 2016, 200).

Conclusion

The three rental housing sectors in South Africa are not distinct as far as the general provisions governing the relationship between tenants and landlords are concerned. The RHA seems to be the "mother" legislation on relations between tenants and landlords.

32 Section 1 of the HA.

As such, the NHC and SHA fit into the requirement of habitability in the landlord-tenant framework in the sense that the implementation of these laws should be achieved in line with the general provisions governing the relationship between tenants and landlords, as set out in the RHA. In turn, public and social sector landlords should function and operate in compliance with the RHA. This position would mean that the general obligation imposed on private sector landlords, to ensure habitability, should also be complied with by public and social sector landlords. Such a position is important as it paints a coherent, complete picture and delineates the scope of what constitutes habitability in respect of tenants' rights in all three sectors of South African rental housing.

Private, public, and social sector landlords owe both negative and positive constitutional obligations to tenants who reside on their rental property. However, the positive constitutional obligation that could be imposed on landlords may differ from the positive obligation imposed on the state. While private, public, and social sector landlords are required to physically provide habitable rental housing, it would be interesting to see whether the same obligation will be imposed on the state, on private land. That is, would the state be expected to build or upgrade rental housing to a habitable state, on privately owned land? Nevertheless, the state should be expected to take positive steps to protect and promote the right to habitable rental housing of private, public, and social sector tenants.

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